



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 88809/2019

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |

05 APRIL 2022

Date

K. La M Manamela

In the matter between:

**SOFT COFFEE (PTY) LIMITED
DOMENICO PICONE
SASSON JEAN
TYRONNE HARDING
YARON ASAYAG
ELIYAHU SAIG**

**1ST PLAINTIFF
2ND PLAINTIFF
3rd PLAINTIFF
4TH PLAINTIFF
5TH PLAINTIFF
6TH PLAINTIFF**

and

THE LEGAL PRACTITIONERS FIDELITY FUND

DEFENDANT

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **05 APRIL 2022**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] This matter concerns the theft of monies (by an attorney and/or an employee of a firm of attorneys) belonging to the first to sixth plaintiffs (the Plaintiffs) and the liability of the defendant, the Legal Practitioners Fidelity Fund (the Fund) to reimburse the Plaintiffs for the loss arising from the theft under section 26¹ of the Attorneys Act 53 of 1979 (the Attorneys Act). The Plaintiffs caused summons to be issued in this Court against the Fund for payment in the amount of R6.7 million owing to the first plaintiff, Soft Coffee (Pty) Ltd (Soft Coffee, when referred to individually) (claim A), and R2.7 million owing to the Second to Sixth Plaintiffs (claim B), together with interest on both claims and costs. The Fund denied liability in respect of both claims and is defending the action. Its defence has since crystallised to the denial of liability on the basis that the stolen funds were not “entrusted” to the impugned attorneys, as envisaged by section 26 of the Attorneys Act.

[2] The hearing in this matter took place through a virtual link on 17 and 18 November 2021. Mr J.L Kaplan, together with Ms T Govender, appeared for the Plaintiffs, and Mr G A Oliver appeared for the Fund. This judgment was reserved after listening to counsel’s closing argument during the second day of trial. I had also directed, after both parties had closed their clients’ respective cases, that counsel file written submissions prior to making an appearance for oral submissions or argument on the second day. I am grateful to counsel for the helpful material filed. Next, I deal with the respective party’s case, as appearing on the pleadings followed by the evidence adduced during the trial and then assessing the evidence and the submissions against the applicable legal principles.

¹ Section 26 of the Attorneys Act provides for the purpose of the fund. See footnote 5 below for a reading of this provision in the material part. Section 55(1) of the Legal Practice Act 28 of 2014 (the LPA) contains similar provisions. The LPA replaced the Attorneys Act practically as from 1 November 2018, although the date of its commencement was announced as 1 February 2015.

Plaintiffs' case

[3] The Plaintiffs' claims against the Fund concern the theft of monies by the attorneys' firm of Mr Davor Vid Dadic (Mr Dadic), namely Dadic Attorneys, and/or an employee of Dadic Attorneys, Mr Andruw Stephens (Mr Stephens), during 2017 or 2018. Soft Coffee was a client of Dadic Attorneys since about 2011 or 2012 and it had utilised the services of Dadic Attorneys in various matters.

Claim A

[4] Claim A is exclusively by Soft Coffee against the Fund. Its features include the following. During 2017, Mr Dadic and Mr Stephens, alternatively Mr Stephens provided Soft Coffee with two loan agreements, purportedly, to be separately concluded between Soft Coffee and two entities called Atomic Transport CC (Atomic) and Flake Ice Services (Pty) Limited (Flake Ice). The loan agreements appeared to have already been signed by a certain Mr Charles Henry Parsons (Mr Parsons), as the representative of both entities.

[5] Mr Dadic and Mr Stephens, alternatively Mr Stephens (henceforth Dadic Attorneys) misrepresented to Soft Coffee that the loan agreements were valid and had been signed on behalf of Atomic and Flake Ice, when this was not the case. This meant that monies would be lent and advanced in terms of the loan agreements by Soft Coffee to Atomic and Flake Ice. Dadic Attorneys, further, misrepresented that the loan monies would be paid first through the trust account of Dadic Attorneys and, thereafter, advanced to Atomic and Flake Ice. The misrepresentations were for the payment of the amount of R3 million and R5 million for the purported loans to Atomic and Flake Ice, respectively. It is common cause between the parties that the loan agreements were invalid and part of a fraudulent scheme contrived by Dadic Attorneys to misappropriate the monies from Soft Coffee.

[6] The loan agreement in respect of Atomic contained clause 3.1, which reads as follows:

“Notwithstanding date of signature hereof, [Soft Coffee] undertakes to advance the sum to the trust account of Dadic Attorneys, who will in turn advance the capital amount free of deduction, set-off to Atomic upon signature of all requisite documents enabling [Soft Coffee] to register a mortgage bond over Erf 2146 Wentworth and Atomic hereby accepts such payment on the terms and conditions set out in this agreement.”

[7] Clause 3.1 of the loan agreement in respect of Flake Ice also contained similar provisions to those quoted above in respect of Atomic, save for the description of the parties and the immovable property involved.

[8] To further the misrepresentation for the payment of R3 million, Mr Stephens, as an employee of Dadic Attorneys, also presented Soft Coffee with documents purporting to be an offer to purchase and a deed of transfer of the property to Atomic. This led to Soft Coffee paying in tranches monies totaling R3 million into the trust account of Dadic Attorneys between 21 and 30 November 2017, as a loan to Atomic. For the payment of R5 million, Mr Stephens, as the employee of Dadic Attorneys, presented Soft Coffee with documents purporting to be a power of attorney to register a mortgage bond, a covering mortgage bond and a deed of transfer of a property to Flake Ice. The first two documents were purportedly signed by Mr Parsons. Between 17 and 20 October 2017, Soft Coffee paid into Dadic Attorneys' trust account - in tranches - various sums of monies totaling the amount of R5 million, as a loan to Flake Ice.

[9] Mr Stephens or Dadic Attorneys misappropriated or stole the amounts of R3 million and R5 million paid to them by Soft Coffee. But an amount of R1.3 million was repaid by

Dadic Attorneys to Soft Coffee, as interest earned on the loans. Therefore, Soft Coffee suffered loss in the amount of R6.7 million in respect of claim A.

Claim B

[10] Claim B concerns the misappropriation of monies amounting to R2.7 million by Dadic Attorneys paid by the Second to Sixth Plaintiffs into the trust account of Dadic Attorneys. The monies, according to the Second to Sixth Plaintiffs, were meant to be a deposit or part payment towards the acquisition of a member's interest in an entity called Conquin CC. The Second to Sixth Plaintiffs had concluded an agreement (only orally when the payment was made) with certain Mr Ahmed Rashid Khan and Mr Shocket Ally Khan (the Sellers or the Khan brothers) for the sale of member's interest held by them in Conquin for the amount of R8 million. Conquin owned the immovable property then occupied by the Plaintiffs in terms of a lease agreement. The Fund refused to reimburse the Second to Sixth Plaintiffs the amount of R2.7 million stolen by Dadic Attorneys on the basis that it was not an entrustment envisaged by section 26 of the Attorneys Act. I deal with the Fund's case, next.

The Fund's case

[11] According to the Fund, the principal feature of the loan agreements between Soft Coffee and Atomic and Flake Ice, respectively, is that they both were agreements for monies to be lent and advanced, and subsequently to be repaid to Soft Coffee along with additional amount payable to Soft Coffee for the use of the money by the borrower in the form of interest. This means that the respective transactions clearly constituted a loan in accordance with the common law. Basically, the Fund says that any liability to the Soft Coffee for the loss suffered through

theft by Dadic Attorneys is excluded. It relied on section 47(1)(g),² read with section 47(5),³ of the Attorneys Act. More is said by way of submissions by counsel for the Fund, below.

Evidence adduced at the trial

[12] Soft Coffee called, as witnesses, Mr Sasson Jean (Mr Jean), the third plaintiff, and Mr Domenico Picone (Mr Picone), the second plaintiff. Mr Jean, mainly, testified on claim B and Mr Picone on claim A. The Fund closed its case without calling any witness. Below is the summary of the evidence in as far as it is material to the issues to be determined in this matter.

[13] Mr Jean was the first witness for the Plaintiffs and his testimony included the following. He is the founding member of Soft Coffee and started business about 20 years ago as part of Capello, with the other persons cited as the Second to Sixth Plaintiffs. Dadic Attorneys were used by him and his businesses or the other plaintiffs not regularly, but mainly for collection of franchise fees. Their working relationship had lasted three to four years, ostensibly when the material events arose. Their point of contact in Dadic Attorneys was Mr Dadic. He emigrated with his family. But before he left, he introduced Mr Stephens to the Plaintiffs as the person who, thenceforth, will be in charge of the matters, although he will remain a phone call away. The Plaintiffs did not know Mr Stephens that well, at that time. They got to know Mr Stephens well when they were doing installations at Hard Rock Café in Camps Bay. He visited the site regularly to have coffee.

[14] Mr Jean further testified that in 2013 they acquired 50% of Bogart Man. They were based in Marlboro, Johannesburg, but had about 13 outlets countrywide. They were renting

² See footnote 6 below for a reading section 47 of the Attorneys Act in the material part.

³ *Ibid.*

space from the Khan brothers, mentioned above. By 2017 the business of Bogart Man was showing growth and they decided to acquire the building they were renting from the Khan brothers to save on rentals. From November 2017 they started discussing the issue with the Khan brothers. It was either they purchased the property directly or they acquired member's interest in the property-holding entity, namely Conquin. Everything was oral at the beginning with no attorneys involved. The two groups had a very good working relationship. On 28 January 2018, the purchase price of R8 million was agreed between the Plaintiffs and the Khan brothers for the transaction. Mr Shocket Khan said he will get his attorneys to draft an agreement. He later furnished the Second to Sixth Plaintiffs with a draft agreement for discussion purposes. In the meantime, the Second to Sixth Plaintiffs had contacted their banker for finance and it was indicated that the bank will probably finance the transaction on a 70/30 basis. But this was not cast in stone. They were to pay 30% of the purchase price, as the owners of the property to be purchased.

[15] Around 27 or 28 January 2018, Mr Stephens was coincidentally in their offices for another matter, when the deal with the Khan brothers was discussed. When they received the draft of the agreement from the Khan brothers they asked Mr Stephens to take a look at it. He told them that the lawyer used by the Khan brothers was unknown and from a small firm. He advised them that the money be paid to Dadic Attorneys. Around 30 January 2018, they paid the amount of R2.7 million into the trust account of Dadic Attorneys. Although there was no deal yet concluded at that stage, they paid the money to show the Khan brothers, as the Sellers and landlord, that the money was safe and that they were serious. Their understanding was that the money was to be paid back to them, less costs, in the event that no deal was done. But the Khan brothers were unhappy as they wanted the money to be paid into their lawyers' trust account. During the last week of February 2018, the bank advised them in writing that the

financing had been approved and they received a terms sheet reflecting the financing on 70/30 split basis. Their 30% was in the trust account of Dadic Attorneys.

[16] On 1 March 2018, they signed the agreement with the Khan brothers for the purchase of the property. They were travelling overseas on business and instructed Mr Stephens to immediately pay the deposit money over to the Khan brothers' attorneys in order to save on rental. But Mr Stephens did not pay. He later stopped communicating with them and they couldn't trace him even through his wife. Upon their return to the country they paid a visit to the offices of Dadic Attorneys, but Mr Stephens was not there. They later learned through copies of bank statements they received from employees of Dadic Attorneys that their money was not in the trust account of Dadic Attorneys. Further enquiries led them to Mr Parsons, named in the agreements or documents relating to Atomic and Flake Ice. Mr Parsons told them that Mr Stephens was his attorney, but he had never heard of the transactions. The transaction with the Khan brothers collapsed. They continued with the rental agreement, but ultimately raised the money and bought the property on the same terms.

[17] When asked about the work that would have been done by Dadic Attorneys with regard to the transaction with the Khan brothers, Mr Jean told the Court the following. The agreement had been drafted by the attorney for the Khan brothers, but Dadic Attorneys had to look at the clauses to be fixed or needed alterations. As prospective purchasers they did not know whether there was going to be value added tax or transfer duty payable. They were still considering the option whether to purchase a member's interest or not. It was between the accountant and the attorney to find the right deal. Also, Mr Jean testified that the R2.7 million paid was to cover the legal fees, bond and conveyancing charges. They had expected a statement of account. He also confirmed that although the bank has given them a terms sheet for the 70% financing, it

was still a process as they needed to address other issues such as life insurance before the bank could furnish a final grant letter.

[18] Under cross examination Mr Jean was steadfast in his earlier testimony, including regarding the following. The agreement was drafted by the attorney for the Khan brothers on instruction from one of the Khan brothers. When referred to clause 3 of the agreement, dealing with the requirement that the purchaser furnishes 100% guarantee and asked why there was no split of 30/70% in the agreement, he responded that the seller wanted 100% and it was irrelevant whether the bank or them made the payment. They, actually, did not know if the bank would give them 100%, but it was still their responsibility to secure the entire funding for the purchase price.

[19] Mr Jean was also quizzed by counsel for the Fund why the agreement did not state that the money should be paid first into the trust account of the Second to Sixth Plaintiffs' attorneys to which Mr Jean explained that it was taken for granted that the 30% was to come from them, as the bank had said that it would pay 70%. The agreement did not state how they will secure the money, but just the full amount. Perhaps they did not look into the clause. They would have paid into the Sellers' trust account as it was not a deal breaker, only that coincidentally Stephens was at the time at their offices and advised them otherwise. He confirmed that the money was paid in January 2018 and the agreement signed on 1 March 2018. He denied that Stephens told them they will earn more interest on their money and explained that the Khan brothers said they should buy member's interest as it was supposed to be quicker, but there was no talk about interest. They did not anticipate that the bank will take longer when they paid the deposit, but as it turned out, the bank took longer before the final approval.

[20] Counsel for the Fund also referred Mr Jean to clause 16 of the agreement dealing with the non-variation of the agreement and the fact that any variation had to be in writing. Mr Jean labelled the question, a legal question. He confirmed that he did not change the clause and mentioned that it was important to secure the funds. When referred to clause 17 of the agreement dealing with the whole agreement he confirmed noting the contents thereof. He also confirmed that there was no mention in the agreement of money having to be paid into a trust account. Counsel told Mr Jean that he will argue that Mr Stephens had offered them a better rate of interest, but Mr Jean again denied that interest was offered.

[21] The re-examination of Mr Jean was very brief. Here are the essentials thereof. Mr Jean confirmed that the payment of the deposit was to secure the transfer of the property. He reiterated that the Khan brothers wanted the purchase price and it did not matter where the money came from. He again confirmed that the agreement was signed on 1 March 2018. That is the moment the full agreement came through and was printed and signed, he explained.

[22] The second and last witness for the Plaintiffs was Mr Picone. His testimony was very brief. He confirmed the agreements involving Atomic and Flake Ice, and testified also on what was expected to happen in the two transactions, including the passing of the mortgage bond. He explained that for the money to be paid or advanced, the mortgage bond had to be registered. He answered that the signatories to the agreements had to be them and the attorney. He also confirmed that no mortgage bond was registered. Mr Picone was not cross-examined. The Plaintiffs closed their case after the testimony of Mr Picone and the Fund also closed its case without calling any witness. Next, I deal with the evidence and submissions by counsel, against the applicable legal principles.

Evidence, submissions or closing legal argument and the applicable legal principles (discussed)

[23] It is common cause that the material events in this matter took place during the tenure of the Attorneys Act, which was replaced by the LPA, principally, from 1 November 2018.⁴ I find the following provisions of the Attorneys Act primarily relevant for the determination to be made in this matter: sections 26 and 47. Section 26⁵ specifies the purpose of the Fund, subject to the provisions of the Attorneys Act, itself. Section 47 provides for the limitation or exclusion of liability of the Fund.⁶ Naturally, these statutory provisions have featured in the submissions by both counsel, including those specifically referred to below. First, the aforementioned provisions in more detail.

[24] Section 26(a) of the Attorneys Act essentially provides for the Fund's liability to reimburse persons who have suffered loss where the following exists: (a) the person had suffered pecuniary loss; (b) the pecuniary loss is due to the theft by "a practising practitioner, his candidate attorney or his employee"; (c) the theft is of money or other property entrusted

⁴ See footnote 1 above.

⁵ Section 26(a) of the Attorneys Act reads as follows in the material respect: "Subject to the provisions of this Act, the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of - (a) theft committed by a practising practitioner ... or his employee, of any money or other property entrusted by or on behalf of such persons to him ... or employee in the course of his practice ..."

⁶ Section 47 of the Attorneys Act reads as follows in the material part: (1) The fund shall not be liable in respect of any loss suffered - ... (g) by any person as a result of theft of money which a practitioner has been instructed to invest on behalf of such person after the date of commencement of this paragraph. ... (4) Subject to subsection (5), a practitioner must be regarded as having been instructed to invest money for the purposes of subsection (1)(g), where a person - (a) who entrusts money to the practitioner; or (b) for whom the practitioner holds money, instructs the practitioner to invest all or some of that money in a specified investment or in an investment of the practitioner's choice. (5) For the purposes of subsection (1)(g), a practitioner must be regarded as not having been instructed to invest money if he or she is instructed by a person - (a) to pay the money into an account contemplated in section 78(2A) if such payment is for the purpose of investing such money in such account on a temporary or interim basis only pending the conclusion or implementation of any particular matter or transaction which is already in existence or about to come into existence at the time that the investment is made and over which investment the practitioner exercises exclusive control as trustee, agent or stakeholder or in any fiduciary capacity; (b) to lend money on behalf of that person to give effect to a loan agreement where that person, being the lender - (i) specifies the borrower to whom the money is to be lent; (ii) has not been introduced to the borrower by the practitioner for the purpose of making that loan; and (iii) is advised by the practitioner in respect of the terms and conditions of the loan agreement; or (c) to utilise money to give effect to any term of a transaction to which that person is a party, other than a transaction which is a loan or which gives effect to, a loan agreement that does not fall within the scope of paragraph (b)...".

by or on behalf of such person to the practising practitioner, his candidate attorney or his employee, (d) all these occurred in the course of the practising practitioner's practice.⁷ These provisions will feature in the discussion, below.

[25] Section 47 of the Attorneys Act excludes the liability of the Fund (imposed by section 26, referred to above) in respect of the loss suffered by a practitioner or persons or entities related to the practitioner due to theft of their monies or property, under specified circumstances. The exclusion under section 47(1)(g), relied upon by the Fund, concerns a loss suffered by a person due to theft of money which a practitioner has been instructed to invest on behalf of such person.⁸ Section 47(5) of the Attorneys Act expands on what an investment is or, actually, what is not an investment (i.e. when one adopts the negative form of the provision).

[26] The link between sections 26 and 47 becomes clear when a claim for reimbursement under section 26(a) is met by the reliance of the Fund on one of the exclusions listed under section 47. This is the case in this matter. To succeed in such a claim, a claimant would have to establish the four legs or requirements under section 26(a), mentioned above.⁹ On the other hand, the Fund when relying on the exclusion under section 47, including under section 47(1)(g), bears the onus to establish the exclusions.¹⁰

⁷ *Industrial and Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control* 1997 (1) SA 136 (A) (*Industrial and Commercial Factors*) at 140E-F, cited with approval in *King and others v Attorneys Fidelity Fund Board of Control* 2010 (4) SA 185 (SCA) (*King v Attorneys Fidelity Fund*) at par 9.

⁸ *King v Attorneys Fidelity Fund* at par 32. Section 47(1)(g) was part of the insertions (including section 47(5)) made in terms of an amendment to the Attorneys Act by notice on 2 December 1998 and is said to have come into operation of 15 January 1999. See *King v Attorneys Fidelity Fund* at par 11. See also section 1 of the Attorneys and Matters relating to Rules of Court Amendment Act 115 of 1998.

⁹ See par 24 above.

¹⁰ *King v Attorneys Fidelity Fund* at par [32]. See footnote 6 above for a reading of the material provisions of section 47 of the Attorneys Act.

[27] It is common cause in this matter that all the requirements of section 26(a) are established, save that the stolen money was “entrusted” by or on behalf of the Plaintiffs to Dadic Attorneys. The Fund denies “entrustment” of the monies lost in respect of both claims on the basis of section 47(1)(g). This, as I have it, means that the Plaintiffs have to establish that the stolen monies were “entrusted”, as envisaged by section 26(a). But even if “entrustment” is established, the liability of the Fund will be excluded should the Fund establish the existence of the exclusion under section 47(1)(g).

[28] What appears in the two preceding paragraphs becomes necessary because of the Plaintiffs’ argument that where reliance is placed by the Fund on section 47(1)(g), read with section 47(5), it equates to the Fund conceding that there was entrustment in terms of section 47(4), also of the Attorneys Act.¹¹ Plaintiffs’ counsel submits that a concession in this regard is a matter of law once reliance is placed on section 47(1)(g). A practitioner can only invest the funds where such practitioner has been entrusted with the funds in terms of section 47(4)(a) of the Attorneys Act, it is argued.

[29] The argument on behalf of the Plaintiffs – with respect – appears rather technical or even compartmentalised in nature and approach. As explained above, the “entrustment” of money material for current purposes is provided for in terms of section 26(a).¹² A claimant seeking reimbursement occasioned by theft of money is required, among others,¹³ to establish that the money was “entrusted by or on behalf of” the claimant to the practitioner or his

¹¹ Section 47(4), subject to section 47(5), provides a presumption of the existence of an instruction to a practitioner to invest money as envisaged by section 47(1)(g) where the practitioner is instructed (by the person who entrusts money to the practitioner or for whom the practitioner holds money) to invest all or some of the money in an investment either a specified investment or an investment chosen by the practitioner. See par 25 and footnote 6 above.

¹² The following *dicta* by Grosskopf JA in *Industrial and Commercial Factors* at 144J are pertinent: “In view of the foregoing I am satisfied that the appellant has shown a sufficient element of entrustment to bring it within the ambit of s 26(a).”

¹³ See par 24 above for the requirements of section 26(a) of the Attorneys Act.

employee. The entrustment referred to under section 47(4)(a) features as part of the defence by the Fund based on section 47(1)(g). Reliance on section 47(1)(g) does not relieve the claimant of the requirements under section 26(a), including that there was “entrustment”. The two provisions (i.e. sections 26 and 47) are interlinked in such a way that the Fund when relying on the fact that the lost monies were “invested”, as envisaged by section 47(1)(g) read with section 47(5), does not mean that it has admitted entrustment under section 26, for the enquiry to have advanced that far. When the exclusions under section 47 are invoked it simply means that what could ordinarily be considered entrustment will not constitute “entrustment” which would render the Fund liable. The Fund is not assumed, either in law or fact, to have conceded “entrustment” and neither is it compelled to do so. In fact, the whole debate is rendered academic by the fact that even if there can be any concession, the enquiry will continue to determine whether any liability is excluded on the basis of section 47. The analogy seems (at first blush only) comparable with a defence in the form of a ground of justification in the law of delict.¹⁴ Therefore, the determination of “entrustment”, say in this matter, is done as part and parcel of the determination of any exclusion invoked from section 47 by the Fund.

Claim A (based on the loan agreements)

[30] This claim concerns the theft of R6.7 million by Dadic Attorneys or Mr Stephens in terms of two bogus loan agreements. Perhaps to start the discussion with the submission by counsel for the Plaintiffs that, the facts predicated claim A by Soft Coffee is on all fours with the facts in the SCA decision in *The Attorneys’ Fidelity Fund v Prevanca Capital (Pty) Ltd*¹⁵

¹⁴ “A ground of justification excludes the wrongfulness of the defendant’s conduct. Grounds of justification are typical circumstances which occur regularly in practice and indicate conclusively that interference with the plaintiff’s legally-protected interests was reasonable, and therefore lawful. Interference with a legally-protected interest, for example the object of a subjective right, is *prima facie* wrongful and the existence of a recognised ground of justification conclusively rebuts the *prima facie* inference of wrongfulness. In other words, conduct which ordinarily would have been unlawful is considered to be lawful *ab initio*.” See Midgley, JR. 2016. *Delict: in Law of South Africa (LAWSA)*, 3rd ed, vol 15 (LexisNexis online version - last updated on 31 March 2016) at 110, but quoted without accompanying footnotes.

¹⁵ *The Attorneys’ Fidelity Fund v Prevanca Capital (Pty) Ltd* (917/17) [2018] ZASCA 135 (28 September 2018) (*Prevanca*).

(*Prevance*). The decision in *Prevance* was an unsuccessful appeal against the decision of this Division (*per* Vorster AJ) which had found that the Fund is liable for the loss of monies deposited by *Prevance*, a bridging finance company, into the trust account of Mr Robert Victor Weide. In *Prevance*, as in this matter, the court dealt with bogus sale agreements presented to *Prevance* containing the signatures of non-existent parties, which was part of a fraudulent scheme to facilitate the misappropriation of monies by Mr Weide. But Mr Oliver for the Fund holds a different view. He submitted that the facts in *Prevance* are clearly distinguishable from those in the current matter before the Court, including on the basis that, the attorney involved (i.e. Mr Weide), had himself accepted that the monies had been entrusted to him. Mr Weide had also provided certain warranties to *Prevance*, the lender. I will revert to the applicability of *Prevance* to the matter before the Court, below.

[31] Let me turn to the issue of “entrustment”. What is it? The Attorneys Act does not define “entrust”, “entrusted” or other cognate words, such as “entrustment”. In *Provident Fund for the Clothing Industry v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund*¹⁶ Nicholas J considered the definitions of the word “entrust” from other authorities and, among others, held “[f]rom these definitions it is plain that ‘to entrust’ comprises two elements: (a) to place in the possession of something, (b) subject to a trust. As to the latter element, this connotes that the person entrusted is bound to deal with the property or money concerned for the benefit of others”.¹⁷ (italics added) This definition or explanation was adopted in other decisions including in *Industrial and Commercial Factors*.¹⁸ The Appellate Division (as the SCA was known then) in *Industrial and Commercial Factors* further held that the authorities do not imply that “the liability of the Fidelity Fund is limited to those cases where the money

¹⁶ *Provident Fund for the Clothing Industry v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund* 1981 (3) SA 539 (W) (*Provident Fund*).

¹⁷ *Provident Fund* at 543E-F, derived from *Estate Kemp and others v McDonald's Trustee* 1915 AD 491 at 499.

¹⁸ *Industrial and Commercial Factors* at 144B-C.

or property concerned was impressed with a trust in the technical legal sense of the word” on the analogy of the Afrikaans text of section 26(a) of the Attorneys Act.¹⁹

[32] On the other hand, the word “invest” or “investment” is also not defined by the Attorneys Act for purposes of section 47. In *King v Attorneys Fidelity Fund* the SCA held that the term “invest” ought to be given its ordinary grammatical meaning.²⁰ The SCA further held that the legislature intended the word “invest” in section 47(1)(g) to have its ordinary meaning and used the dictionary meanings of the word.²¹ In *King v Attorneys Fidelity Fund* the plaintiffs had deposited their monies or handed over same for payment into the trust account of the attorneys for purposes of being invested in the factoring scheme and were held to have indeed intended their monies to be so applied.²²

[33] It is my understanding of the above that an “entrustment” under section 26(a) which is an “investment” envisaged by section 47(1)(g), read with section 47(5) is proscribed. This is the end-result urged upon by the Fund in this matter.

[34] According to the Fund in both instances Soft Coffee undertook to advance the sum concerned to the trust account of Dadic Attorneys who would in turn advance the capital amount, free of deduction or set-off to Atomic or Flake Ice upon signature of all requisite documents enabling Soft Coffee to register mortgage bonds over some specified immovable properties. Atomic and Flake Ice, as the borrowers, were to pay interest to Soft Coffee at monthly intervals on the capital sum advanced and deposited into the trust accounts of Dadic Attorneys. Dadic Attorneys have since repaid two amounts of R250 000.00 each on 24 October

¹⁹ *Industrial and Commercial Factors* at 144D-E. See also *Prevance* at par 12.

²⁰ *King v Attorneys Fidelity Fund* at par [33].

²¹ *King v Attorneys Fidelity Fund* at par [33].

²² *King v Attorneys Fidelity Fund* at pars [34]-[35].

and 21 November 2017 and further amount of R800 000.00 on 17 January 2018. This is the R1.3 million payment referred to above.²³ The principal feature of these written agreements was that it was an agreement for the loan of money which had to be repaid to Soft Coffee along with an additional amount payable to Soft Coffee for the use of the money by the borrower in the form of interest. It is further argued on behalf of the fund that the transactions clearly constitute loans in terms of our common law (i.e. a *mutuum*).²⁴ The Fund says the lost monies were investments in respect of which its liability for the loss thereof is excluded by section 47(1)(g), read with section 47(5).

[35] Counsel for the Fund argues that Soft Coffee, at any stage, never intended to pay the monies over to Dadic Attorneys as an entrustment, but on the specific understanding that the monies were to be paid over to borrowers as loans. Counsel says this is borne by the specific provisions of the Atomic and Flake Ince loan agreements, more particularly clause 3 of these agreements,²⁵ which confirm that Dadic Attorneys were mere conduits for the loans. He cites the SCA decision in *Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Pty) Ltd*²⁶ which concerned an appeal by the Fund against the finding by this Division (*per* Tolmay J) that the Fund was liable for the loss sustained by Mettle, a factoring company due to theft of trust funds by the attorney, namely, Mr Langerak, paid into his trust account in relation to bridging-finance transactions. The agreement between the attorney and Mettle was that the attorney, undertook to pay to Mettle from the proceeds of the registration of a bond and two property transfers once the proceeds were received. The funds failed to materialise and subsequently the attorney's estate was sequestrated. Mettle sued the Fund under section 26(a) of the Attorneys Act on the basis that it has suffered pecuniary loss due to the theft of the

²³ See par 9 above.

²⁴ Du Bois, F (ed). 2007. *Wille's Principles of South African Law*, 9th ed (Juta Cape Town) at p 948.

²⁵ See par 6-7 above.

²⁶ *Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Pty) Ltd* 2012 (3) SA 611 (SCA) (*Mettle*).

money entrusted to Mr Langerak by Mettle. The court *a quo* found in favour of Mettle, but the SCA held that Mr Langerak was no more than a conduit for the money,²⁷ and, therefore, there was no “entrustment” of money by Mettle to Mr Langerak.²⁸

[36] It is also submitted on behalf of the Fund that payment of the loan amounts by Soft Coffee was in discharge of Soft Coffee’s contractual obligations to pay over the loan amount once the borrower had complied with its obligation to effect signature of all requisite documents enabling Soft Coffee to register a mortgage bond over the specified immovable property. Therefore, there was no express mention of intention to effect an entrustment to Dadic Attorneys as was the case in *Prevance* and the trust account of Dadic Attorneys was merely a conduit for the payment of the loan amounts by Soft Coffee to the borrowers. Further, that Dadic Attorneys, through Mr Stephens, specified the borrowers to whom the money was to be lent and introduced the borrowers to the lender for the purpose of making that loan. This means that two of the requirements under section 47(5)(b) are not met for the provisions in this section to avail Soft Coffee.²⁹

[37] I agree that the objective evidence in terms of the written loan agreements, including clause 3.1 in both the loan agreements for Atomic and Flake Ince does not reflect nor suggest any involvement of Dadic Attorneys in respect of the monies received and subsequently stolen, other than just the use of the trust account of Dadic Attorneys. In terms of clause 3.1 of the loan agreements Soft Coffee undertook to pay the amounts of R3 million and R5 Million into the trust account of Dadic Attorneys; Dadic Attorneys, in turn, had to advance those amounts “free of deduction, set-off” to Atomic and Flake Ice, as the borrowers, upon signature of all

²⁷ *Mettle* at par 15, partly relying on *Prevance* at par 18..

²⁸ *Mettle* at par 16 relying on *Industrial and Commercial Factors* at 143I-144A and *Provident Fund* at 544B-G.

²⁹ See footnote 6 above for the requirements under section 47(5) of the Attorneys Act.

requisite documents which would have enabled Soft Coffee to register mortgage bonds over the specified immovable properties. Counsel for the Plaintiffs argued that because Mr Picone testified about the attorney's work that he understood would follow once the funds were paid over into the trust account, this should entirely dispel any notion that the trust account served as a conduit. Mr Picone testified on what was expected to happen in the two transactions, including the passing of the mortgage bond. According to him for the money to be paid or advanced, the mortgage bond had to be registered. Mr Picone confirmed that no mortgage bond was registered. I must say that I find this at odds with the common cause fact that Dadic Attorneys paid to Soft Coffee an amount of R1.3 million in the form of interest on the transactions. A few questions come to mind. Was Soft Coffee, when receiving the "interest" payments, under the impression that the transactions have been finalised and the mortgage bonds registered? If so, when were the bonds registered as the bonds are said to have been a requirement for the completion of the transactions? What work, if any, did Dadic Attorneys do in the transactions? Did Soft Coffee pay for the work done by Dadic Attorneys by the time it received R1.3 million? But it is not necessary that these questions get answers. There is clearly no evidence of any undertakings by Dadic Attorneys to anyone, apart from the fact that Dadic Attorneys was not even party to the loan agreements. The fact that Dadic Attorneys and/or Mr Stephens had to perform certain work for Soft Coffee, as testified by Mr Picone, is comparable to the situation that pertained in the *Mettle* decision, and does not establish any form of entrustment.³⁰ Further, any work done by Dadic Attorneys had no bearing on the payment of the monies in terms of the loan agreements. In my view, the transactions are clearly loans in respect of which neither section 47(5)(b) nor section 47(5)(c) of the Attorneys Act avail the lender, Soft Coffee, as is set out above.³¹

³⁰ See par 35 above for a brief discussion of the fact in *Mettle*.

³¹ See footnote 6 above for a reading of section 47 in the material part.

[38] Counsel for the Plaintiffs submitted that *Prevance* contradicts the Fund's case on the basis that by virtue of Atomic and Flake being introduced to Soft Coffee by Dadic Attorneys, this constitutes an investment, since it does not fall within section 47(5)(b) or 47(5)(c), and as such the Fund is liable.

[39] In *Prevance* the SCA found that the soliciting of funds was with the objective of theft, much like with Atomic and Flake transactions, it is submitted on behalf of Soft Coffee. Therefore, on the objective facts, there was no investment as it is common cause that the entire "investment" was nothing less than a fraudulent edifice created by Dadic Attorneys to solicit the payments of the amounts into trust and the immediate theft thereof.

[40] This brings me to the possible impact or relevance of the fraud on the issue of investment or entrustment. In fact, counsel for the Plaintiffs, relying on *Prevance*, submitted that once the Fund concedes that the loans were fictitious or bogus as the Fund has done, that is the end of the matter, since Dadic Attorneys or Mr Stephens had but one objective in receiving the funds: theft. Objectively observed there was never a question of an investment being made, the submission is concluded. On the other hand, counsel for the Fund submitted that its defence in *Prevance* did not fail in the SCA because the transactions in the *Prevance* were bogus, as it does really not matter that the transactions were bogus.

[41] I think the submissions by counsel, immediately above, warrants a closer look at what the SCA said in *Prevance* regarding the issue of the fictitious or bogus loans. Firstly, the SCA said that the Fund faced a "formidable obstacle" (the first one, it was said) in its reliance on the statutory exception in section 47(1)(g) as when the facts in *Prevance* are objectively observed there was never any investment being made. Mr Weide, the attorney, solicited the funds from

Prevance and received them into his trust account with the sole objective of stealing same and not for the purpose of an investment or any other legitimate purpose.³² Therefore, as the SCA held, the existence of fictitious or bogus investment perpetrated by a thieving attorney is not the end of enquiry but a significant step in the enquiry potentially posing a formidable obstacle to be cleared by the Fund when its defence, based on section 47(1)(g), is that the stolen monies were subject of an investment. Secondly, in *Prevance* it was mentioned that “[c]onsidering that Mr Weide had presented fictitious documentation and referred to fictitious sellers and purchasers, Prevance was the only entity that would suffer pecuniary loss”.³³ Then Mathopo JA (as he then was) concluded that “*for the aforesaid reasons*” (italics added), there cannot be any question that the stolen funds were entrusted to Weide.³⁴ But clearly in this regard, the “aforesaid reasons” for the conclusion of the SCA was not only that documentation, the sellers and purchasers involved were fictitious. It was one of the reasons. Thirdly, still in *Prevance*, the SCA sought to differentiate that case from the decision of the Western Cape High Court (Cape Town) in *Attorneys Fidelity Fund Board of Control v Claassens*,³⁵ relied upon by the Fund in *Prevance*. In doing so, the SCA did not simply refer to the existence of fictitious transactions in *Prevance*, but to other features in *Prevance*, such as the type of undertakings made by Weide, the attorney.³⁶ Therefore, whether the Fund has conceded, as it did in the current matter before this Court, that the loans were fictitious or bogus and part of a fraudulent scheme by Mr Dadic and Mr Stephens, it “is [not] the end of the matter”. The enquiry continues and it ought to. Clearly, *Prevance* does not support the position contended for by the Plaintiffs and neither do the provisions of the Attorneys Act.

³² *Prevance* at par 9.

³³ *Prevance* at par 13.

³⁴ *Prevance* at par 13.

³⁵ *Attorneys Fidelity Fund Board of Control v Claassens* (A620/2011) [2012] ZAWCHC 376 (4 December 2012).

³⁶ *Prevance* at par 18.

[42] I agree with counsel for the Fund that the facts in *Prevance* are clearly distinguishable. And, as I have indicated, *Prevance* was decided on more grounds than only the bogus or fictitious nature of the transactions, for example, on the basis of certain warranties provided by Mr Weide, the attorney, to *Prevance*, as the lender, and Mr Weide having himself accepted that the monies had been entrusted to him.

[43] But does this mean that the fact that the transactions were bogus or fictitious alone not sufficient to hold that there was no investment or even entrustment. I think the answer to this question lies partly in the decision in *Rodel Finance Services (Pty) Ltd v Attorneys Fidelity Fund*³⁷ of the Western Cape Division (Cape Town). *Rodel* involved a fraudulent scheme by an attorney in respect of his clients in terms of which the attorney misappropriated the monies paid into his trust account by a bridging finance company, named *Rodel*. But the transaction unbeknown to *Rodel* was bogus. There was no genuine bond transaction. The Court held that payment by *Rodel* of the money into the trust account of Mr Geduld in effect was payment of the money to the debtors (i.e. the attorney's clients) as part discharge of its indebtedness to the debtors regarding the purchase consideration for the proceeds of the bond. There was no term in the standard agreement indicating that payment would only be made into the trust account of an attorney. *Rodel*'s intention in paying the money was to discharge its obligation towards the client. It did not matter that the account happened to be a trust account of an attorney, the Court further pointed out.³⁸ The Court distinguished – on the facts – *Rodel* from *Industrial and Commercial Factors v Attorneys Fidelity Fund*. In the latter the ICF's representative, Mr Flax, believed that in terms of ICF's agreement with Ms Branken, the client, ICF had to pay Ms Branken and nobody else; also Mr Mare, the attorney, did not say to Mr Flax that payment into

³⁷ *Rodel Finance Services (Pty) Ltd v Attorneys Fidelity Fund* (16833/2007) [2010] ZAWCHC 407 (24 May 2010) (*Rodel*).

³⁸ *Rodel* at par 22.

his trust account was occurring at Ms Branken's request, and Mr Mare did not profess to be receiving the money as Ms Branken's agent.³⁹ The Court found that on the particular facts of *Rodel*, the money was not entrusted to Mr Geduld as envisaged by section 26 of the Attorneys Act and dismissed the plaintiff's claim.⁴⁰ Evidently, the court did not consider the fact that the transaction concerned was bogus, to have any bearing on the determination of whether or not there was an entrustment of such money, and found for the Fund.

[44] In the matter before this Court, despite the bogus nature of the transactions, the only viable inferences from the nature of the respective transactions are that Soft Coffee did not intend an entrustment, but that the amounts concerned be paid over to Atomic and Flake Ice, as borrowers (fictitious as they may be), as loans; Dadic Attorneys did not receive the monies concerned as entrustments, but as loans. Secondly, specifically as regards a lender's instructions to a practitioner, sections 47(1)(g) and 47(5)(b) find application where the practitioner has "*been instructed*" by the lender concerned to lend money on behalf of that person to give effect to a loan agreement. Therefore, it is the nature of the instruction itself that is determinative of whether those sections find application or not, irrespective of whether the transactions were in fact, unbeknown to the lender, bogus.

[45] Also in *King v Attorneys Fidelity Fund* the SCA dismissed an appeal against the dismissal of the claims of the appellants against the respondent by the Grahamstown High Court for reimbursement of their stolen monies allegedly entrusted to a firm of attorneys involving a "factoring scheme" which concerned the advancement or discounting of the commission of estate agents, who did not want to wait for the ultimate transfer of the

³⁹ *Rodel* at par 23.

⁴⁰ *Rodel* at pars 24-26.

immovable properties after the sales of such properties. The attorney misappropriated the monies paid into his trust account. The Fund denied that the monies were “entrusted” to the attorney and argued that the attorney received the monies in trust in order to invest same on their behalf, as envisaged in section 47(1)(g), read with sections 47(4) and 47A of the Attorneys Act.⁴¹ The plaintiffs deposited their monies or handed over same for payment into the trust account of the attorneys for purposes of being invested in the factoring scheme and, therefore, indeed intended their monies to be so applied.⁴²

[46] In my view where reality meets fiction, as in this matter, the determination of whether the funds were to be invested or not, as envisaged by section 47(1)(g), can only be made by taking at face value what the underlying transactions were. The fictitious or bogus nature of the transactions only discovered by the party who “entrusted” the money subsequently stolen on the basis of the fraudulent scheme is only secondary in the enquiry to be made in this regard. What has to be primarily determined is the nature of the instructions or mandate given to the attorney or practitioner. This is partly the holding in *King v Attorneys Fidelity Fund* in which the attorneys involved had stated that the sole mandate given to them was to invest the monies paid over to them, which in the view of the Court meant that the attorneys in that case were mere conduits for the loans.⁴³

Claim B (agreement with the Khan brothers)

[47] Claim B concerns the amount of R2.7 million misappropriated by Dadic Attorneys after it was paid by the Second to Sixth Plaintiffs into the trust account of Dadic Attorneys. This was meant to be a deposit or part payment towards the acquisition of a member’s interest in a

⁴¹ *King v Attorneys Fidelity Fund* at par 7.

⁴² *King v Attorneys Fidelity Fund* at pars 34-35.

⁴³ *King v Attorneys Fidelity Fund* at pars 35-36.

property-owning entity in the amount of R8 million (the Property Sale Agreement). The Fund also disputes this claim on the basis that the stolen money was not an entrustment envisaged by section 26.

[48] The Fund has some misgivings about some clauses in the Property Sale Agreement. First, it is argued on behalf of the Fund that there is no provision in the Property Sale Agreement requiring the Second to Sixth Plaintiffs to pay the sum of R2.7 million or any other amount as deposit towards the purchase price into the trust account of Dadic Attorneys to be held in the trust account until the finalisation of the sale and purchase of the intended member's interest. What was required in terms of clause 3.2 of the Property Sale Agreement was for the Second to Sixth Plaintiffs to secure the purchase price by furnishing to the Sellers Attorneys (specified in the agreement) a bank guarantee acceptable to the Sellers within 30 days of the date of signature of the Property Sale Agreement. There is also criticism by counsel for the Fund levelled at the existence of clauses 16 and 17 of the Property Sale Agreement, referred to above.⁴⁴ The conclusion drawn by counsel on behalf of the Fund is that the R2.7 million was not paid into the trust account of Dadic Attorneys in consequence of the Property Sale Agreement and accordingly, there was no entrustment of the said amount to Dadic Attorneys.

[49] But the evidence before this Court by Mr Jean was that the parties had verbally agreed that 30% deposit was needed and on advice from Mr Stephens they chose to pay monies into the trust account of Dadic Attorneys. They paid the money to show the Khan brothers, as the Sellers, that the money was safe and that they were serious about purchasing the property. They were expecting to get the 70% balance from the bank, according to the initial indication from their banker. Mr Jean was unwavering on this point throughout his testimony.

⁴⁴ See par 20 above

[50] I agree with counsel for the Plaintiffs that nothing stops the parties to an agreement to reach a verbal agreement or to act *dehors* or outside the scope of the contract. One may be entitled to wonder at this manner of doing things, especially given the fact that both sides enjoyed the benefit of legal representation when negotiating the agreement. To me, what all these mean suggest the existence of two agreements, one oral and another written, whose terms may not be in harmony with each other. But it does not suggest that the agreement relied upon by the Second to Sixth Plaintiffs for their claim has nothing to do with the stolen funds.

[51] Counsel for the Fund also charged that Mr Jean did not play open cards with the Court by providing details or documents or correspondences with either the bank or the Khan brothers regarding the “30% deposit”. I find this submission, with respect, very absurd. The trial is not the stage where issues relating to the discovery of documents are raised. And to the extent that the Fund was taken by surprise, which is not alleged, by the testimony and wanted access to the impugned documents, this could have been directly addressed by the Fund or its counsel. The complaint is not helpful to the Court and, to the extent that it was meant to discredit the unchallenged evidence by Mr Jean in this regard, it is unsuccessful. I find the evidence to clearly show that the R2.7 million paid into the trust account of Dadic Attorneys was to be kept in such trust account and that Dadic Attorneys had an obligation to pay it over to the Sellers or their attorneys as deposit towards the purchase of the property. My view is not affected by the difference in the amount of R300 000.00, evidently above the 30% required as deposit on the R8 million purchase price. It is correct that Mr Jean did not testify as to how the figure of R2.7 million is arrived at. But his unchallenged evidence is that the additional amount was a contingency for costs and disbursements.

Conclusion and costs

[52] Based on what is stated above, I find that there was no entrustment in respect of claim A by Soft Coffee against the Fund. The trust account of Dadic Attorneys was merely intended to be used as a conduit for the payment of the stolen funds to Atomic and Flake Ice, as loans or investment in terms of which returns were expected in the form of interest. Indeed a sum of R1.3 million was returned and appears to have been accepted by Soft Coffee as “interest”. The Fund’s reliance on the exclusionary provision of section 47(1)(g) of the Attorneys Act is justified. With regard to claim B, I find that the amount of R2.7 million, which represents the pecuniary loss suffered by the Second to Sixth Plaintiffs due to the theft by Dadic Attorneys or Mr Stephens as an employee of Dadic Attorneys was entrusted by or on behalf of the Second to Sixth Plaintiffs to Dadic Attorneys in the course of Dadic Attorneys’ practice. Therefore, I will grant an order dismissing claim A and granting claim B.

[53] In as far as costs are concerned the usual order is that costs should follow the outcome. But this is a bit tricky as both parties are equally successful, but I will let the aforementioned conventional rule prevail: costs will follow the outcome(s). The taxing master would have to find a way of dealing with the effect of the order when the bills of costs are presented for taxation. Counsel for the Plaintiffs had submitted that the trial was anticipated to run for approximately 2 to 3 days, but was concluded in less than a day, because there was no dispute of fact between the parties. But I don’t think that this aspect is so pronounced as to have a bearing on the location of liability regarding the issue of costs or whether to grant same at a punitive scale. Therefore, costs shall be at the scale of party and party, but (in the case of the Plaintiffs) shall include costs consequent to the employment of two counsel, wherever employed.

Order

[54] In the premises, I make the following order:

- a) the first plaintiff's claim for payment in the amount of R6 700 000.00 (referred to as Claim A in the pleadings) is dismissed with costs;
- b) the second to sixth plaintiffs' claim for payment in the amount of R2 700 000.00 (referred to as Claim B in the pleadings) is granted with costs, and the defendant shall pay the amount of R2 700 000.00 to the second to sixth plaintiffs;
- c) the defendant shall pay interest on the amount in b) hereof at the rate of 10.25% *per annum* from date of this order to date of full payment of the amount in b) hereof, and
- d) the costs in b) hereof shall include costs consequent upon the employment of two counsel, wherever employed.



Khashane La M. Manamela

Acting Judge of the High Court

DATES OF HEARING : 17 & 18 NOVEMBER 2021

DATE OF JUDGMENT : 05 APRIL 2022

Appearances:

For the Plaintiffs : Mr JL Kaplan
Ms T Govender

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For the Defendant : Mr GA Oliver
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